No. 22399 and 22399A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM A. PEARSON,

Appellant,

vs.

ROBERT W. HEISER and
SANDRA STAMPER,

Appellees.

OPENING BRIEF FOR APPELLANT

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1. STATEMENT OF PLEADINGS AND FACTS — JURISDICTION

This is an appeal taken from an interlocutory decree in admiralty, pursuant to 28 U.S.C.A. § 1292(a)(3).

The United States Constitution provides "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction". Article III, Section 2.

Jurisdiction in admiralty is exclusively Federal, the purpose being to keep the maritime law essentially uniform and harmonious.

The Lottawana, 88 U.S. 588 (1875) and many cases. See *Benedict on Admiralty,* Volume 1, page 1.

Jurisdiction is specifically granted the district courts by 28 U.S.C.A., Section 1333.

Appellate jurisdiction in admiralty cases, in respect of both interlocutory and final decrees, has been conferred by Congress upon the Courts of Appeal.

28 U.S.C.A., Sections 1291, 1292.

The statutory limitation of liability law is found in 46 U.S.C.A., particularly Sections 182, 183, 185 and 188. Section 185 provides that a vessel owner may petition a district court of competent jurisdiction for limitation of liability.

Proceedings to limit liability are within the general maritime law and admiralty jurisdiction, and form an independent head of jurisdiction.

Richardson vs. Harmon, 222 U.S. 96 (1911)

Limitation of liability actions apply to all vessels used on lakes or rivers or in inland navigation.

46 U.S.C.A., Section 188

A decree denying a shipowner's petition to limit liability is appealable within the meaning of the Interlocutory Appeals Act.

Republic of France v. U.S., 290 F.2d 395 (1961 5th Circ.) cert. denied 369 U.S. 804 (1962)

This litigation resulted from the collision of two motor pleasure boats on Lake Havasu, a part of the Colorado River, and navigable waters of the United States. (F.13, T.76).[1]

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1. Legend F. Finding of Fact
C. Conclusion of Law
T. Clerk's Transcript of Record
R. Reporter's Transcript of Proceedings
Ex. Exhibit

Three guests on one of the boats were killed, and one was injured. Suits for damages were filed in the California courts against the owners of both boats. Each owner then filed a petition to limit liability in admiralty (T.2 and 10). State court suits filed on account of the deaths and injury were restrained and the claimants then filed claims in the limitation proceedings (T.25, 51, 56) and answers to the petitions (T.19, 37, 44). The petitions were then consolidated for trial (T.61).

An interlocutory decree was entered by the District Court on August 22, 1967 (T.79). Findings and conclusions on the issues of liability and petitioners' right to limit were filed August 3, 1967 (T.74). Appellee, Heiser, was held liable to the three death claimants (C. 1, T.77). Appellant, Pearson, although held not directly liable to the death claimants, was held liable to Heiser for one-half the total damages (C.2, T.78). Both Heiser and Pearson were also held severally liable to the injured claimant, appellee Stamper, and each liable to each other for one-half the Stamper damages (C.3, T.78).

The District Court found that neither petitioner was guilty of minor fault only (F.22, T.76) — in other words, the Court concluded the case was one of mutual fault. It is on this basis, as indicated in the Memorandum Decision filed March 10, 1967 (T.71), that the Court ordered each owner to indemnify the other for one-half his legal liability.

Prior to entry of the Interlocutory Decree the three death claims were settled and dismissed (T.83-94). This appeal involves petitioner Heiser and claimant Stamper as appellees.

Notice of Appeal was filed August 30, 1967 (T.81).

2. STATEMENT OF THE CASE

As stated this case is the result of a motor boat collision on Lake Havasu. Appellant, William A. Pearson, an American Airlines pilot, was the operator of a 13 foot outboard motor boat owned by himself. Appellee, Robert Heiser, was the operator of a 16 foot inboard motor boat which he owned. Claimant and Appellee, Sandra Stamper was a passenger seated in the front seat of Pearson's craft prior to the collision (T.75, R.36, 37, 660).

The collision occurred sometime after 9 p.m. on a dark, moonless, clear Friday night. During the preceding week Pearson and various of his American Airlines fellow employees had come to Lake Havasu for a recreational and water skiing outing. The make-up of the group had changed from day to day. Miss Stamper, a stewardess with American Airlines, had herself arrived on the Friday morning (T.75, R.659).

During the day, the group had gathered at a campsite on the Arizona side of Lake Havasu known as Three Dunes. It is located in an approximately northerly direction a little more than half a mile from Black Meadow Landing, a campground on the California side where the Pearson group had been staying (T.75).

Heiser was not a member of the American Airlines group but had joined them on the afternoon of May 21 and, after leaving for a short time, had returned later in the evening. By this time, all of the Pearson group had stopped water skiing (R.208).

As the sun set and the wind came up, the group decided to break its daycamp on the Arizona side and return to Black Meadow Landing. Although all of the group had originally gone over to Arizona on several trips of the Pearson boat, Heiser volunteered the use of his boat

to split up the people and the equipment so that Pearson would not have to return to Arizona for a second trip (R.208). Three girls, Miss Stamper, Katherine Kelley and Nancy Van Horne, got in the front seat of Pearson's craft with him. Seated on the stern seat was John Blaney (Exhibit P43). Some water skiing gear and an ice chest were also loaded in Pearson's boat. It left the Arizona side first, headed for California (T.75).

Heiser's boat followed with himself and William Cherbak seated in the front seat. Gayle Schonning was standing between the front and the back seat leaning on the motor housing, and Miss Penny Hicks was on the back seat. (R.208, 209). The steering wheel of Heiser's boat was on the right side. Pearson's steering wheel was on the left side. Each operator was behind his own steering wheel. The Pearson boat was travelling at about 20 mph. Shortly after it departed from Three Dunes, the Heiser boat passed travelling at about 30 mph. Both boats were then headed directly for Black Meadow Landing (T.75, 76).

Having passed the Pearson boat, Heiser continued directly to the vicinity of the beach at Black Meadow Landing. Meantime, when Pearson was about halfway across the Lake, Blaney's hat blew off. Pearson then turned on a reverse course and slowed down while those on board looked for Blaney's hat (T.76).

They had no luck in finding the hat. After a minute or so Pearson again turned and headed back toward the lights at Black Meadow Landing continuing at slow speed. The Court found that speed of the Pearson boat was "Safe and reasonable if Pearson was and had been maintaining a proper lookout" (T.76). Pearson estimated this slow speed to be 2 to 3 mph (R.49, 50, 82, 144).

When the Heiser boat neared Black Meadow Landing, those aboard looked back at Pearson's lights and concluded the Pearson boat was dead in the water or turning slowly. Schonning suggested the boat might be in some difficulty and Heiser turned his boat, accelerated, and proceeded toward the Pearson lights at a speed which reached about 20-23 mph with the intention of rendering assistance should it be needed (T.76).

Within approximately one minute after Heiser had turned and headed toward Pearson's lights the two boats came into collision. The Heiser boat struck Pearson a short distance aft of the bow on the starboard side. The angle of impact the Court found to be between 10° and 30° on the starboard bow of Pearson's boat. The Heiser boat drove up and over the Pearson boat which sank almost immediately (T.76). Three passengers on the Pearson boat, namely, Nancy Van Horne, Katherine Kelley and John Blaney, were killed. Miss Stamper, the fourth passenger, suffered personal injuries. Pearson was only slightly injured.

The Court found the collision occurred at a point approximately 900 to 1,000 ft. north of the beach at Black Meadow Landing off a peninsula or point of land jutting out in a northerly direction from the eastern edge of Black Meadow Landing. The area of collision was indicated by various witnesses on a chart of the area before the Court (Ex. H1).

The Court found (T.77) that the running lights and stern lights of both boats were fully operating and were lighted at all times prior to the collision. (The Court did not find specifically that the lights of the Heiser boat were not obscured and could have been seen by those on the Pearson boat).

The Court found that neither boat operator saw the other boat or its lights after the turns were made before the collision. The Court further found that Heiser operated his boat on a course headed in a general direction toward the lights of the Pearson boat in darkness with knowledge that the Pearson boat was ahead and without keeping the Pearson boat lights in view (T.77).

The Court found that Heiser was negligent in failing to keep a proper lookout and that such failure was a proximate cause of the collision (T.77). The Court likewise found Pearson negligent in failing to keep a proper lookout (T.77) and that this was also a proximate cause of the collision (T.77).

The questions involved and the issues raised will be shown in the Specification of Errors to follow.

3. SPECIFICATION OF ERRORS

The District Court made several fundamental errors. These were: first, in concluding that Pearson could have and should have seen the lights of Heiser's boat during the very short time involved and was negligent because he did not; second, in concluding that if Pearson had seen the Heiser boat lights he could have and should have taken unilateral action which would have avoided collision; third, in concluding that this was not a situation in which the admiralty rule of major vs. minor fault should be applied.

Even accepting the Court's finding that Pearson was negligent, we submit the Court erred in concluding that Pearson's failure to see Heiser was a proximate cause of the collision. The *proximate* cause was Heiser's great negligence in the face of known perils, which fully accounts for the collision.

These errors resulted from imposing a standard of care and duty on Pearson far greater than should have been applicable under the "reasonable man" legal concept in the circumstances. Also involved is failure to observe the fact that had Pearson seen the Heiser boat lights the situation would nevertheless have been one of "in extremis". There is also involved failure to give due consideration to the required burden of proof on Heiser and the other claimants against Pearson in a limitation of liability proceeding.

The errors made by the District Court are stated in the Brief Statement of Points on which appellant intends to rely (T. 110-112). The essential errors, restated, are these:

1. The evidence does not support the finding that petitioner Pearson was negligent in failing to keep a proper lookout.

2. The evidence does not support the finding that negligence by petitioner Pearson was a proximate cause of the collision.

3. The evidence does not support the finding that fault by petitioner Pearson was not a minor fault.

4. The findings and Interlocutory Decree impose an unreasonable burden of duty and standard of care upon petitioner Pearson.

5. The evidence clearly established gross negligence and recklessness by petitioner Heiser, who should have been held solely at fault for the collision.

6. The court should have applied the well-established major and minor fault admiralty rule and held petitioner Heiser solely at fault for the collision because his negligence was major and sufficient to fully account for the collision.

7. The findings and Interlocutory Decree are based solely upon the inference and conclusion that failure to see the lights of the Heiser boat constituted negligence which was more than minor fault negligence in comparison with the gross negligence of Heiser and fails to give proper consideration to:

(a) The conditions existing at the time and place of collision;

(b) The difficulty presented a lookout on the Peason boat to see the lights of the Heiser boat;

(c) The compounding of such difficulty by shore lights in the background;

(d) The fact that the white stern light on the Heiser boat may have been obscured by persons on board and the red and green single fixture running lights may have been obscured by the angle of the bow of the Heiser boat which came up in the water during the approach;

(e) The short interval of time during which the Heiser boat approached the Pearson boat over a short distance on a collision course; and

(f) The difficulty and uncertainty which would have attended any decision as to action to alter course "in extremis" had Pearson seen the lights of the Heiser boat approaching, anticipated danger of collision and endeavored to avoid collision by some steering maneuver.

(g) The degree or extent of negligence sufficient to constitute proximate cause.

We will discuss these errors.

4. ARGUMENT

We will summarize each argument briefly as a head note to each point discussed.

A. Heiser's glaring negligence alone caused the accident.

The Court erred in not holding that Heiser's reckless, careless and negligent operation of his boat, was so substantial that he was solely at fault for the collision.

Heiser failed to maintain any lookout whatsoever after turning and heading toward the lights of the Pearson boat and did not watch or see the lights after he headed toward it (F.19, T.77). Heiser created the entire danger of collision. He operated his boat on a collision course headed in a general direction toward the lights of the Pearson boat in darkness with knowledge the Pearson boat was ahead and without keeping the boat lights in view (F. 19, T.77). Heiser misestimated the distance and came upon the Pearson boat much quicker than he thought he would (F.19, T.77, R.259). These faults were so great they established sole fault on Heiser by application of general principles of admiralty law.

When Heiser decided not to beach his boat as intended and as Pearson expected, but to go back out into the lake to see whether anything was wrong aboard the Pearson boat, he testified he turned pretty quickly, putting his wheel hard over, speeded up (R.223); did not thereafter see the lights, continued to sit on his seat and did not stand up (R.225); did not ask anyone else to keep a lookout (R.226); lost visibility of the lights (R.227, 248), relied upon his judgment where the Pearson boat was (R.241), estimated his speed at 18 to 22 mph (R.242); proceeded a comparatively short time and reached Pearson much quicker that he thought he would (R.259).

Heiser was going back with a good samaritan motive to see if help was needed but this does not excuse his complete neglect of lookout, particularly when he was deliberately heading directly where he judged Pearson to be and trying to get there quickly.

We respectfully urge that Heiser's negligence was sufficient to hold him fully responsible for the collision, regardless whether Pearson did or did not see the Heiser boat lights and tried to avoid the danger Heiser alone created.

The evidence that Heiser's bow came up was clear. It did obscure Heiser's vision. This made it inexcusable of Heiser to fail to stand up or make some effort to try to watch Pearson's lights.

Heiser testified the bow of his boat rises and stays up until the boat planes or "comes up on the step," at a speed of 20 to 23 mph depending on weight and placement of weight on board (R. 196, 197). He also testified in his deposition that he lost visibility of the lights at the time the bow came up (R. 248). Just before the trial he amended his deposition and stated he did not recall seeing the lights after he first came into the beach (R. 248). In the deposition he confirmed his bow was between him and the lights of the Pearson boat:

"That's what happened". (R. 249).

Schonning, one of the airline pilots on Pearson's boat, confirmed that the bow came up after they came out of the turn (R.270). Cherbak, the other pilot, also confirmed the bow "naturally" went up (R. 307) and said the lights disappeared when Heiser applied power (R. 313).

Charles Sinclair, who testified as a technical witness in behalf of Pearson, gave evidence consistent with the foregoing. He stated that during night runs made at Lake San Marcos, the driver of the test Chris-Craft was required to half stand in his driver's seat in order to see his steering point, a flashlight fixed approximately 3 ft. above the water level (R. 528). The tests (see Ex. P. 43) made by Pearson's expert, Arthur DeFever, a naval and marine architect and marine surveyor, were likewise

Pearson cannot be faulted under the conventional rules for crossing or meeting situations (e.g. Art. 18, 19, 21 or 22 of the Rules of the Road). Heiser alone created the dangerous situation an extremely short time before the collision. The navigating rules presuppose approaching vessels are in sight of one another and can check each other's position and course.

Lind vs. United States (2d Cir. 1946) 156 F.2d 231, at 233;

Borcich vs. Ancich (9th Cir. 1951) 191 F.2d 392 (and cases cited at n.4).

While Heiser was proceeding *away from* Pearson, no relation between them existed. There was no "need for precaution". Only after Heiser turned did a "risk of collision" arise and then only because of the course chosen by Heiser and the special circumstances. At *that* point Heiser *knew* he was headed toward Pearson. Pearson had no reason to suspect Heiser was approaching directly toward him at high speed, without watching, and would run him down. The situation was a "special circumstance", with Heiser the burdened vessel; he created the risk of collision; he, not Pearson, was under the duty to take precautions necessary to avoid it.

The District Court decision that Pearson was negligent is based upon the fact that Pearson did not see the lights of the Heiser boat. Failure to keep a proper lookout would be a contributing factor in the collision only if a reasonable standard of care would demand that a proper lookout aboard the Pearson boat could and should have seen Heiser's lights; could and should have determined in the time available that a boat was approaching and there was danger of collision; and could and should have taken some action which would have avoided the accident.

We will discuss the evidence which we submit proves:

(a) Pearson was keeping a reasonable lookout under the circumstances during the short period Heiser headed on a course towards him prior to the collision;

(b) the most vigilant lookout might not have seen Heiser's lights because they were small, difficult to pick up against the lights on shore, and the small running lights may well have been obscured by the bow, and the stern light by Schonning;

(c) mere failure to see lights of a small boat on a dark night, whose high speed on a short approach is not reasonably to be anticipated, does not constitute negligence; and

(d) It is highly speculative to assume Pearson could have, and should have, unilaterally avoided collision had he seen Heiser's lights within a reasonable time after Heiser headed toward him on a collision course.

The District Court concluded, *solely by inference from Pearson's frank testimony he did not see Heiser's lights,* that he was not keeping a proper lookout. This is, of course, contrary to Pearson's testimony. Initially, on direct, he testified (R. 52):

> "Q Tell the Court what you were doing so far as looking out is concerned after you had headed back on your original course?
>
> A Well, I was looking for this red light, which was on the end of the point, and I can for some reason still remember the silhouette of the hill, and I can't recall the red light but I know I was looking for it, and . . .
>
> Q Did you look toward Black Meadow Landing?
>
> A Yes, sir, I was looking ahead and to the left, and I don't recall looking way off to the right, but I know I was scanning across from ahead of the boat back to the left and probably behind on the left,

trying to get sight of this red light that I knew was there.

Q What do you mean by the word "scanning"?

A Well, I was just moving my head around from one direction to the other".

In answer to additional questions, both on direct and under long cross-examination, Pearson testified further: That he was looking *where they were going* which was the camp area (R.54); that he was concerned with the point of land on his left and could see *where they were going because of the lights* although the point of land was obscured (R.55); that as he proceeded in toward the beach he was *scanning ahead looking where they were going* and that his main point of interest was trying to keep from running aground and *keep heading in the right direction* (R.59-60); that there were many background lights (R.129); that *he saw the lights where they were going* but no light identified as an approaching boat (R.60); that his concentration was more on the left because he was concerned about the point of land (R.84); that Heiser's boat had blended in with the lights in the background and was out of the way (R.133); that he was *looking around* and also looking down (R.142); that he was concerned to *get lined up toward where they were going* and watching the point of land (R.143); that he was *looking ahead to the beach and scanning for other boats* (R.143); that he was concerned with the point of land on the left which was only about 100 feet distant with its beach line hard to make out (R.147-148); that he was *primarily concerned with getting back to the landing area* (R.165); that among other things he was looking for the hat (R.165); that *he was looking where they were going* (R.169); that he was not primarily concerned with the hat but was more concerned with the point of land and *where they were heading* (R.177).

Nevertheless, apparently, rejecting this testimony, the Court found that at the time of and prior to the collision Pearson "was looking for Blaney's hat and his attention was directed predominantly to his left and he was not keeping a proper lookout" (F.16, R.76).

The evidence introduced on time, speed and distance emphasizes the error made by the Court in concluding Pearson was negligent simply because he did not see and avoid the Heiser boat lights.

The evidence proved Heiser accelerated. Heiser said he gradually increased power after he turned (R.222, 263) and that he speeded up (R.222). Schonning said Heiser accelerated as he came out of the turn and estimated speed somewhere around 20 to 25 mph at the time of collision (R.270). Cherbak said he didn't know the speed; then estimated 15 to 20 mph (R.303). He confirmed Heiser applied power after the turn (R.313). Bird, on the beach, said Heiser accelerated up to 20 or 25 mph (R.690, 691).

Estimates of time elapsed from Heiser's turn until collision by those who could make any estimate were as follows:

> Cherbak thought it was a very short period of time but it would be a pure guess and did not estimate it (R.301).
>
> Schonning estimated the time as under 30 seconds —"30 seconds or less" (R.295).
>
> Bird thought it was something under a minute (R.690).
>
> The Court found it was "approximately a minute" (T.76).

Accepting the District Court's findings as to the speed of the Heiser boat (20-23 mph) (T.76) and the distance

of the point of collision from Black Meadow beach (900 to 1,000 feet) (T.76) makes it obvious the elapsed time after Heiser completed his turn and headed toward Pearson's lights to the moment of impact must have been on the short side of the Court's finding that the time was "approximately one minute". (T.76). At 23 mph a boat travels 2024 feet in 60 seconds. It will cover 900 feet in about 27 seconds and 1,000 feet in about 30 seconds. At 20 mph a boat travels 1,760 feet in one minute and would cover 900 feet in about 32 seconds and 1,000 feet in about 35 seconds.

Heiser was not headed toward Pearson or on an approaching course until his turn. Witnesses estimated he was 30 to 50 feet off the beach at this time (T.268, 688). Therefore, he was on an approaching course for a distance somewhat less than the distance from the beach to the point of collision.

During the time Heiser was approaching Pearson was also moving toward him at slow speed, as the Court found (T.76); 2 to 3 mph according to Pearson (R.49, 50). At 3 mph a boat travels 264 feet in one minute; at 2 mph 176 feet in one minute.

It is unreasonable to require any boat owner to maintain a lookout which will insure and guarantee, within such a short period of time, that a boat's lights will be seen, the course of the boat determined, the danger of collision realized and some proper action taken to avoid collision. The standard of care imposed by the District Court further required anticipation by Pearson that the driver of an approaching boat might not be watching and would not make any effort to steer clear, which Heiser could easily have done.

We most respectfully repeat this imposed an unreasonable standard of care and duty to claimants. A lookout

has more than the duty only to look ahead. It was not *negligent* to look for the lost hat. Pearson was concerned about going aground in the dark on the unlighted point of land to the left and cannot be faulted for looking for it among other things.

The District Court concluded, despite Pearson's testimony, that the mere fact he did not see the Heiser boat lights and avoid the collision made imminent by Heiser's clear negligence also constituted negligence. This was clearly erroneous in the light of the other findings of fact.

A boat can come from any direction. Running lights of motor boats are small and difficult to see at best. The type of single running light on the Heiser boat is in evidence (Ex. H.2). The lights on shore behind Heiser's boat increased the difficulty. Even after they are seen, running lights must be evaluated to determine the course of the boat and whether it is approaching, crossing or headed in some other direction. The location of the white stern light in relation to the colored running lights is quite important in determining a boat's course. Any navigator appreciates that it takes time to determine, after sighting running lights and a stern light, whether a vessel is on an approaching or a crossing course and, particularly, whether it will *maintain* that course. Danger of collision cannot be known until the bearing of an approaching vessel is observed for an appreciable time and the course determined.

A substantial part of the trial and many exhibits introtroduced pertained to technical testimony, both oral, documentary and visual, on whether the *bow* lights of the Heiser craft could be seen by those in Pearson's boat.

Pearson first introduced the expert witness statement of Arthur DeFever (Ex. P.43). This was obtained following discovery deposition testimony which suggested Heiser's lights were obscured. It offered a possible ex-

planation of the fact that Pearson did not see the lights (nor did Miss Stamper, seated in the right front seat of the Pearson boat (R. 663-664)).

Testimony by Captain Wetmore and by Poe, the Chris-Craft engineer, created a conflict in two points only: First, the angle of inclination which a Chris-Craft of the type operated by Heiser would have achieved at the critical hull speeds and, second, whether the bow running lights of the Heiser craft would have been visible to an observer low on the water at those speeds (R. 546, 574, Ex. H.15, H.18). Very significantly, the testimony presented did not refute the evidence that Heiser's view of Pearson was obscured by the Heiser bow or that Heiser's white stern light was obscured either by Heiser's bow or Schonning's body.

The latter is of critical significance in understanding the burden the Court placed upon Pearson. Mere failure to observe an approaching boat is no fault if it is impossible to *evaluate* the course and maneuvering of the boat before collision. With the white light invisible and with the bow light alternating between red and green, there was no way in which the most experienced mariner could have determined the course of Heiser as he approached — over a period undoubtedly less than one minute — and taken correct evasive action. Again significantly, no one at trial suggested what evasive action Pearson should have taken. No evidence was offered that *any* evasive action could have been effective.

The two motion pictures viewed by the Court (Exs. P.51 and H.19) confirmed the difficulty, first, in perception, and, if perceived, in evaluation, presented to Pearson. The DeFever movie showed Heiser's white light was obliterated during runs at rpm within the critical speed range. Captain Wetmore's movie showed that the white light was obscured "sporadically" on each run. Captain

Wetmore confirmed this on cross-examination (R. 639-640).

The "movie" boats were only similar to Heiser's, not identical. Captain Wetmore's experimental runs were made without anyone standing behind the front seat in the position occupied by Schonning. Hence the possibility of obliteration of the white light by a passenger did not occur during the Wetmore test runs, but the light nevertheless was obscured part of the time.

Pearson's failure to see and evade Heiser's boat was not proof his lookout was inadequate. The standard demanded of a lookout is based upon reason, not impossible perfection.

A good discussion of lookout is contained in *Stevens v. United States Lines Co.* (1st Cir. 1951) 187 F.2d 670, 674:

> "The lookout rule embodied in Article 29 of the Inland Rules quoted in the margin is broad and general in its terms. It does not spell out what constitutes a 'proper lookout' or even under what circumstances one must be kept. It leaves these matters at large to be determined by reference to the 'ordinary practice of seamen' or to the 'special circumstances of the case.' That is to say, the statute establishes a standard of conduct by which to measure the behavior of mariners with respect to maintaining a lookout under the various circumstances which they may encounter, not a specific rule, or series of rules, for particular specified situations. In keeping with the statutory scheme we shall not attempt to put a gloss upon the statute by laying down a rigid legal rule of general application with respect to what constitutes a 'proper lookout' in a particular situation, or as to the specific circumstances under which some sort of lookout must be kept. Instead of tailoring hard and fast legal rules to fit specific states

of fact as they arise in their infinite variety in these cases, we think it preferable to state as a general proposition that the Article in question requires a lookout in every direction from which danger may reasonably be expected to arise, and that the quality and diligence of the lookout required depends upon the degree, and imminence of the danger reasonably to be anticipated."

In *Lind vs. United States* (2nd Cir. 1946) 156 F.2d 231, the court discussed the matter of the other vessel's lookout and the problem of what action to take:

"The considerations which lie behind these rules seem to us to apply to the case at bar, but to reverse the respective duties. It was substantially impossible for the 'Mary' to 'keep out of the way' of the 'Doubleday', for, not only could she not have made her out very far ahead; but if she had, she could not have learned the 'Doubleday's' course and speed. Moreover, even though Olsen had been at the wheel as he should have been, he would have known that for many minutes and over a distance of three or four miles, his vessel could have been seen by any approaching ship; and he would have been justified in supposing that such a ship would shape her course to avoid him, counting upon the fact that he could not see her or do anything whatever to avoid her until she was near at hand. Moreover, he would have known that even when he did make her out, any act of avoidance by him would at best have been blindman's buff."

Oriental Trading & Transport Co. Ltd. vs. Gulf Oil Corp. (2nd Cir. 1949) 173 F.2d 108 is another example of how confused and difficult the choices of the boat operator can be.

Another case, *Compania De Maderas vs. The* Queenston Heights, (5th Cir. 1955) 220 F.2d 120, also holds, contrary to the finding of the Trial Court whose decision was modified, that failure to have a lookout on the bow was excused where there was gross negligence of the other vessel.

C. The admiralty major and minor fault rules should have been applied.

The District Court erred, as a matter of law, in concluding negligence by Pearson was a proximate cause of the collision because under the facts found by the Court the major and minor fault rule, well established in admiralty cases, should have been found applicable in view of Heiser's gross and inexcusable active fault in comparison with the doubtful and at all events slight passive fault of Pearson.

It would be difficult to find an admiralty collision case in which the facts more strongly call for application of the "major-minor fault rule." We have clear, conceded active fault by Heiser. We have only *inference* of passive fault by Pearson, because he did not see the lights. There is also the *further incorrect inference* that he was not keeping a proper lookout because he was also looking for Blaney's hat and his attention was directed predominantly to his left (to avoid grounding on the point of land).

Griffin, the leading American authority on Collision, explains the major-minor fault rule in this way at pages 505 and 506:

> "It sometimes happens that a collision was due to the gross and inexcusable fault of one vessel, whereas the other's fault was doubtful and, at all events, slight. Under such circumstances, it may be unjust to divide the damages equally, as the American law

requires in cases where both are to blame. Of course, when the other vessel actually was guilty of substantial contributing fault, both vessels must be held; but, when the fault of one was flagrant and was the real cause of the collision, the courts are inclined to hold either (1) that they will not inquire too closely into the conduct of the other and that any doubts will be resolved in her favor; or (2) that her fault was not contributory; or (3) that a slight fault will be wholly disregarded. * * *

If, as the result of *all* the evidence, it appears that the real cause of collision was the grave misconduct of one vessel, and that the fault of the other was doubtful or very slight the principle under discussion may be applied. If the faults of one vessel "sufficiently account for the collision" the court, before condemning the other, "should be satisfied that her fault contributed to the accident" (the Pallanza, C.C.A.2, 189 Fed.43 (1911)). This is merely an effort to attain justice by placing full liability on a flagrant wrongdoer. *In such cases, there must be proof that the other vessel was guilty of substantial contributing fault before the damages will be divided.*" [Emphasis added]

A leading case on the doctrine of the major-minor fault rule is City of New York (1893) 147 U.S. 72. The District Court held both vessels at fault in a collision case. The Circuit Court reversed holding the City of New York solely at fault. The Supreme Court affirmed and held at page 85:

"In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. Where fault on the part of one vessel is

established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

See also: *White Stack Towing Corp.* vs. *Bethlehem Steel Co.* (4th Cir. 1960) 279 F.2d 419.

The Ludvig Holberg (1895) 157 U.S. 60;

The Victory (1897) 168 U.S. 410;

Linde-Griffith Constr. Co. vs. *The* Authentic (2d Cir. 1954) 210 F.2d 757.

We submit this was surely a major-minor fault situation.

D. The Burden of Proof on claimants was not given Proper Weight.

The District Court erred in failing to give appropriate consideration to the burden of proof on Heiser and the other claimants to establish that fault on Pearson's part which contributed actively to the collision.

With respect to the burden of proof on the issue of liability in a limitation proceeding, the law is settled that claimants were required to prove Pearson negligent.

"In the admiralty proceeding in which a shipowner seeks to exonerate himself from liability or to limit his liability, the burden of proving negligence or unseaworthiness rests upon the claimant."

Walston v. Lambertsen (9th Cir. 1965) 349 F.2d 660, 663.

This is the first question to be decided in limitation proceedings.

Petition of Vest (N.D. Cal. 1953), 116 F.Supp. 901.

Several lines of authority dealing with the consequences of unequal fault in collision involve the question of burden of proof. See Griffin, *Collision,* 505-9. Because the fault of Heiser is so clearly established, the burden cast upon him and the other claimants was a heavy two-pronged obligation. To summarize our position on this point:

a. Claimants were required to establish fault on Pearson's part by clear evidence not by *inference.* Yet the District Court inferred from the mere fact that Pearson did not see Heiser's lights and manage to get out of Heiser's way his lookout was defective and constituted proximate cause negligence.

b. Claimants had to establish by equally clear evidence that such fault contributed *substantially* to the collision.

c. Both these issues should have been resolved against Pearson only if the evidence was beyond reasonable doubt.

d. The District Court failed to properly recognize this burden on claimants asserting damages against Pearson.

The question of fault by Pearson was one for claimants to establish, not for Pearson to disprove. Where as here, the positive fault of one vessel (Heiser) is clear, evidence indicating negative fault of the other (Pearson) must be clear and convincing.

The City of New York (supra).

"The SEEGER has the burden of proving the WAIPAWA's fault, and, since she was herself grossly at fault, that burden is more than ordinarily heavy."

United States vs. Shaw, Saville & Albion Co., Ltd. (2nd Cir. 1949) 178 F.2d 849, 851.

Compania Nacional De Navegacao Casteiro Patrimonio vs. Cabins Tanker Industries, Inc. (4th Cir. 1961) 285 F.2d 592, 594.

The STADACONA (6th Cir. 1917) 242 F. 624.

We submit that here the evidence that Pearson did not see Heiser's lights in the short time they might have been observable did no more than raise a question whether this may have been due to improper lookout.

The District Court must have decided that the fact that Pearson did not see the lights of the Heiser boat raised a presumption of negligence on the theory of "Failure to see what ought to be seen." This overlooks the circumstances and the positive rather than negative facts in this case. Specifically these included: Pearson's navigating problem because of the point of land and the lost hat; Heiser's suden reversal of course completely unexpected by Pearson; the short time and distance Heiser travelled on collision course; the difficulty of seeing and evaluating lights if seen; the possible effect of background lights on shore; the darkness on the lake; the possibility that Heiser's lights may have been obscured; the uncertainty whether Pearson could have taken action to avoid collision had he seen Heiser's lights.

We submit these facts make the present case quite unlike those in which failure to see lights has been held to be negligence sufficient to be the proximate cause of a marine collision.

CONCLUSION

We urge that the facts found by the District Court do not warrant judgment, making Pearson, not only legally and monetarily liable, but also morally responsible, for these deaths and injury. This imposed an unreasonable and impractical duty and standard of care under the facts found, and upon which the judgment is based. This Court can correct the error.

The interlocutory decree should be reversed as to Pearson and modified so as to exonerate Petitioner-Appellant Pearson from liability to Appellee Stamper and from all indemnity obligations to Appellee Heiser, with costs to Pearson in all courts.

Respectfully submitted,

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APPENDIX

Exhibits	Description	Off'd.	Iden.	Rec'd.
P 1	Statement of expert qualifications of Arthur De Fever	319	10	319*
P 2	De Fever sketch, Heiser boat	319	10	319*
P 3	De Fever sketch, Heiser boat	319	10	319*
P 4	De Fever sketch, Heiser boat	319	10	319*
P 5	De Fever sketch, collision	319		319*
P 6	De Fever sketch, Pearson boat	319		319*
P 7	De Fever trial results	319		319*
P 8	De Fever photograph, Heiser boat	317	10	317
P 9	De Fever photograph, Heiser boat	317	10	317
P 10	De Fever photograph, Heiser boat	317	10	317
P 11	De Fever photograph, Heiser boat	317	10	317
P 12	De Fever photograph, Heiser boat	317	10	317
P 13	De Fever photograph, Heiser boat	317	10	317
P 14	De Fever photograph, Heiser boat	317	10	317
P 15	De Fever photograph, Heiser boat	317	10	317
P 16	De Fever photograph, Heiser boat	317	10	317
P 17	De Fever photograph, Heiser boat	317	10	317
P 18	De Fever photograph, Heiser boat	317	10	317
P 19	De Fever photograph, Heiser boat	317	10	317
P 20	De Fever photograph, Heiser boat	317	10	317
P 21	De Fever photograph, Heiser boat	317	10	317
P 22	De Fever photograph, Pearson boat	317	10	317

Exhibits	Description	Off'd.	Iden.	Rec'd.
P 23	De Fever photograph, Pearson boat	317	10	317
P 24	De Fever photograph, Pearson boat	317	10	317
P 25	De Fever photograph, Pearson boat	317	10	317
P 26	De Fever photograph, Pearson boat	317	10	317
P 27	De Fever photograph, Pearson boat	317	10	317
P 28	De Fever photograph, Pearson boat	317	10	317
P 29	De Fever photograph, Pearson boat	317	10	317
P 30	De Fever photograph, Pearson boat	317	10	317
P 31	De Fever photograph, Pearson boat	317	10	317
P 32	De Fever photograph, Pearson boat	317	10	317
P 33	De Fever photograph, Pearson boat	317	10	317
P 34	De Fever photograph, Pearson boat	317	10	317
P 35	Coast Guard photograph, Pearson boat	317	10	317
P 36	Coast Guard photograph, Pearson boat	317	10	317
P 37	Coast Guard photograph, Pearson boat	317	10	317
P 38	Coast Guard photograph, Pearson boat	317	10	317
P 39	Coast Guard photograph, Pearson boat	317	10	317
P 40	Aerial photograph of Black Meadow Landing	10	10	11
P 41	Chart prepared by Dept. of Interior Geological Survey, showing Lake Havasu	9	10	9
P 42	Chris Craft brochure (front page only)	199	10	200

Exhibits	Description	Off'd.	Iden.	Rec'd.
P 43	Statement of Arthur De Fever	319	318	319
P 44	Photograph of a Chris Craft used in De Fever tests	464	463	464
P 45	Photograph of motion picture camera	473	470	473
P 46	Photograph of one of De Fever daylight runs	471	471	472
P 47	Still picture of De Fever tests	473	473	477
P 48	Still picture of De Fever tests	473	473	477
P 49	Still picture of De Fever tests	473	473	477
P 50	Still picture of De Fever tests	473	473	477
P 51	De Fever motion picture film, night runs	490		580
H 1	Chart of Black Meadow Landing and Lake Havasu	10		11
H 2	Sample light	44	45	45
H 3	Pearson's Coast Guard testimony		63	
H 4	Pearson's boating accident report	191	191	191
H 5	Two sketches from Coast Guard record showing angle and point of collision that the boats came together	276	276	276
H 6	De Fever sketch		356	
H 7	De Fever sketch showing 8½° change in vessel angle would conceal Heiser's running lights	358	357	359
H 8	Photograph of Heiser boat taken out of water with buoy in the picture	400	399	
H 9	Sinclair raw notes of test measurements		440	
H 10	Heiser's invoice for purchase of boat	535	534	535
H 12	Photograph of Chris Craft device to measure angularity	562	541	562

Exhibits	Description	Off'd.	Iden.	Rec'd.
H 13	Photograph of Chris Craft device to measure angularity		541	
H 14	Photograph of Chris Craft device to measure angularity		541	
H 15	Chris Craft Corp. test sheet		545	559
H 18	Chris Craft Corp. test sheet	561	560	561
H 19	Wetmore motion picture film			
S A	Written statement of William Bird	707	707	708

*Exhibits P 1 through P 7 for identification were attached to and received as part of Exhibit P 43.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the U. S. Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney